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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS FREDERICK

MAISNIER,

Defendant and Appellant.

A157669

(Solano County  
Super. Ct. No. VCR228078)

Defendant Nicholas Frederick Maisnier appeals from the trial court's order revoking his probation. He argues the trial court did not have sufficient evidence of his probation violation because the only evidence offered was inadmissible hearsay. He contends the admission of the evidence violated his constitutional rights to confrontation, cross-examination, and due process. He further claims he was denied his due process right to adequate notice when the trial court relied on a factual basis not included in the petition for revocation. We affirm.

## **BACKGROUND<sup>1</sup>**

### **A. *Terms and Conditions of Probation***

On February 6, 2017, Maisnier pleaded no contest to one count of felony assault (Pen. Code, § 245, subd. (a)(4))<sup>2</sup> and one count of misdemeanor making criminal threats (§ 422). On May 23, 2017, the court suspended imposition of sentence and placed Maisnier on felony probation, with credit for time served. As a condition of probation, Maisnier was to complete a residential treatment program<sup>3</sup> which he was not to leave without prior consent of the probation department. The court ordered Maisnier to enter into the San Francisco Salvation Army Residential Program (Salvation Army) and advised him, “Do not leave your program or fail to enter the program as directed under any circumstances without authorization from the Probation/Placement Officer or the Court.” (Original boldface and underscoring omitted.)

The terms of probation also required Maisnier to obey all laws and orders of the court, report to and comply with all orders of probation, advise probation of his location and telephone number, and to let probation know within 48 hours of any change.

### **B. *Motion to Revoke Probation***

In July 2017, the probation department filed a notice of violation and request for warrant based on Maisnier’s failure to successfully complete residential treatment as directed. The circumstances of the violation were

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<sup>1</sup> Because the underlying facts are not germane to the issues on appeal, we do not summarize them.

<sup>2</sup> All further undesignated statutory references are to the Penal Code.

<sup>3</sup> The exact nature of the treatment program is unclear, but it appears to have encompassed anger management.

described as follows: “On 05/23/17, Mr. Maisnier was ordered to commit self to a residential treatment program and to remain there until released by the director upon satisfactory completion. The offender was placed at the San Francisco Salvation Army Program on 07/06/17, at which time he was provided with placement instructions (see attached). According to the discharge notice prepared by Patricia Camp, Intake Counselor at the program, Mr. Maisnier left the program voluntarily on 07/14/17 and was then discharged from the program. The discharge notice has been attached for the Court’s review. As of this writing (07/17/17), Mr. Maisnier has made no efforts to contact Probation and his current whereabouts remain unknown.”

The attached summary discharge notice was on Salvation Army letterhead and addressed to Maisnier’s probation officer. According to the discharge summary letter, Maisnier left the Salvation Army program without permission on July 14, 2017.

On July 24, 2017, the court summarily revoked Maisnier’s probation. After nearly two years at large, Maisnier was arrested in Sacramento County on May 8, 2019, and brought before the court.

### ***C. Evidence at the Contested Probation Revocation Hearing***

The court held a contested probation revocation hearing on May 21, 2019. The only witness was Solano County Probation Officer Angelita Vallejo, Maisnier’s probation officer. She had been employed as a deputy probation officer for 18 years. As part of her caseload, Vallejo was assigned to supervise Maisnier and to assist in his placement at a residential treatment facility.

Vallejo met with Maisnier while he was still in custody and personally went over the conditions of his probation, including that he complete the Salvation Army residential program. Vallejo gave Maisnier a placement

instruction document. That document—entitled the “Solano County Probation Department Adult Placement Instruction Form”—was included in the motion to revoke probation filed with the court. (All caps omitted.) Vallejo went over the placement requirements with Maisnier. Maisnier signed the form and agreed to abide by the instructions. Maisnier acknowledged that he was required to complete the program. Maisnier further acknowledged that he was required to immediately notify the probation department if he left the program.

Vallejo was familiar with the Salvation Army program and its practices for communicating with probation. The probation department monitored probationers by “regular and ongoing contact with the staff” at the Salvation Army. Consistent communications between the probation department and the Salvation Army program, by telephone, fax, or email, regularly occurred. In Vallejo’s experience, these methods of communication were both “accurate and reliable” for tracking probationers.

Over Maisnier’s hearsay objection, Vallejo testified that she discovered Maisnier was no longer at the Salvation Army program on July 17, 2017, when her partner, Solano County Probation Officer Mayra Ramirez, contacted the program on an unrelated matter. During that conversation, Ramirez spoke to Marie Geronimo, an intake coordinator, who advised her that Maisnier had absconded from the program on July 14, 2017. Vallejo did not speak with Geronimo about Maisnier.

Over Maisnier’s further hearsay objection, Vallejo testified that shortly after hearing about Maisnier’s departure from the program, she received a fax of a letter confirming his discharge. The one-page discharge summary letter had been attached to the motion to revoke probation. The letter was on Salvation Army letterhead and addressed to Vallejo. In the letter, Patricia

Camp, an intake counselor with whom Vallejo had worked for three years, reported that Maisnier “was admitted to The Salvation Army San Francisco ARC on July 6, 2017 and discharged on July 14, 2017 for AWOL- left voluntarily.” (*Sic.*)

Vallejo testified Maisnier had not been in contact with the probation department since he left the Salvation Army program without notification.

Over Maisnier’s objection, the court expanded the probation violation allegations to include failing to report to the probation department, in addition to absconding from his residential treatment facility. In so ruling, the court explained “it’s pretty obvious and part and parcel of what we are doing and dealing with here.”

The defense presented no evidence and called no witnesses.

The court concluded the hearsay evidence presented was “fairly reliable,” as Vallejo worked in placement and knew Camp. The court revoked Maisnier’s probation, finding by a preponderance of the evidence he violated probation by failing to complete his treatment program and by failing to maintain contact with the probation department. The court imposed the previously suspended three-year prison term.

This timely appeal followed.

## **DISCUSSION**

### **A. *Hearsay Evidence***

Maisnier maintains he was denied his constitutional rights to due process and confrontation because the trial court improperly revoked his probation based on the hearsay testimony of his probation officer at the revocation hearing. According to Maisnier, this hearsay evidence was admitted without good cause.

It is well established that “relaxed rules of evidence govern[ ] probation revocation proceedings . . . .” (*People v. Brown* (1989) 215 Cal.App.3d 452, 454.) “Under this approach, hearsay evidence that is inadmissible to prove guilt in a criminal trial may be admissible to prove an adult probation violation under certain circumstances.” (*In re Eddie M.* (2003) 31 Cal.4th 480, 501.)

A probationer has only a limited right to cross-examine and confront witnesses at a probation revocation hearing. Probation revocation proceedings are not criminal trials to which the Sixth Amendment right to confrontation applies. (*People v. Johnson* (2004) 121 Cal.App.4th 1409 (*Johnson*).) Instead, a limited right to confrontation at probation proceedings stems from the due process clause of the Fourteenth Amendment. (*Id.* at p. 1411.) At a probation hearing, due process requires that the defendant generally be given the right to confront and cross-examine witnesses unless the hearing officer specifically finds good cause for not allowing confrontation. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786.)

For the admission of routine *documentary* hearsay evidence at a probation hearing, due process requires only a showing of sufficient indicia of the document’s reliability. (See, e.g., *People v. Maki* (1985) 39 Cal.3d 707, 709 (*Maki*) [car rental invoice and hotel receipt]; *Johnson, supra*, 121 Cal.App.4th at pp. 1410–1413 [laboratory report showing that seized substance was cocaine]; see *People v. Arreola* (1994) 7 Cal.4th 1144, 1155–1157 (*Arreola*) [distinguishing documentary hearsay evidence from testimonial hearsay evidence].) Sufficient reliability may be established from admissible testimony, or the document itself, indicating that the document is what it purports to be, and the absence of any evidence to the contrary. (See *Maki*, at pp. 716–717 [invoice and hotel receipt had sufficient indicia of

reliability where they each bore the issuing company's name and the defendant's signature, the documents appeared to be of the type customarily relied upon, and there was no evidence tending to contradict the information in the invoice or the inference for which it was used]; *Johnson*, at pp. 1410–1413 & fn. 1 [laboratory report showing seized substance to be cocaine was properly admitted at a probation revocation hearing where a police officer testified that the report was identified by case number and by the defendant's name and came from the crime laboratory that routinely tested narcotics for the police department, and defense counsel made no claim that the report was untrustworthy in any specific way].)

On the other hand, to satisfy due process for the admission of *testimonial* hearsay evidence, a showing of “good cause” to excuse the live testimony is required. (*People v. Winson* (1981) 29 Cal.3d 711, 713–714 [admission of transcript of witness's preliminary hearing testimony at a revocation hearing required showing of unavailability or other good cause]; *Arreola, supra*, 7 Cal.4th at pp. 1155–1157 [admission of transcript of witness's preliminary hearing testimony required showing of good cause].) Good cause may be demonstrated by a showing that the declarant is unavailable, the declarant can be brought to the hearing only through great difficulty or expense, or the declarant's presence would pose a risk of harm to the declarant. (*Arreola*, at pp. 1159–1160.)

“Although a court may not act arbitrarily or capriciously in revoking probation [citation], its discretion in this matter is very broad [citation].” (*People v. Breaux* (1980) 101 Cal.App.3d 468, 475.) We review the revocation of probation for abuse of discretion. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443, 445–446.) A revocation of probation will be reversed only in extreme circumstances. (*Id.* at p. 443.) The facts in a probation revocation

hearing are provable by a preponderance of the evidence. (*Id.* at pp. 441–442.)

*People v. O’Connell* (2003) 107 Cal.App.4th 1062 (*O’Connell*) involved facts similar to those here. There, the defendant’s probation officer alleged the defendant had violated the terms of his deferred entry of judgment, which required that he attend drug counseling sessions. (*Id.* at p. 1064.) At a hearing on the defendant’s alleged violation, the trial court received into evidence a hearsay report from the counseling program reporting the defendant had been terminated from the program for too many absences. (*Id.* at pp. 1064–1065.) Overruling the defendant’s hearsay objection to the report, the trial court found that the “‘authenticity’” of the report from the treatment program was “‘sufficiently based . . . .’” (*Id.* at p. 1065.) The Court of Appeal affirmed the trial court, deeming the report from the program manager to be “akin to the documentary evidence that traditionally has been admissible at probation revocation proceedings” and “bore the requisite indicia of reliability and trustworthiness so as to be admissible.” (*Id.* at pp. 1066, 1067.) Unlike cases in which the prosecution proposed to use former testimony to establish a probation violation, the court determined the program manager’s “report was prepared contemporaneously to, and specifically for, the hearing where [the defendant’s] lack of compliance with the deferred entry of judgment program was at issue. [¶] The [trial] court noted that such reports were routinely received without undertaking the added burden of calling the author to authenticate it because the reports were prepared in response to a referral from the court.” (*Id.* at p. 1067.)

As in *O’Connell*, the Salvation Army letter—a discharge summary from a residential treatment program—also bore the requisite indicia of reliability and trustworthiness so as to be admissible. Vallejo, Maisnier’s probation



officer, testified that her partner communicated with the Salvation Army and learned that Maisnier had absconded from the program. Vallejo received the Salvation Army letter by fax shortly after her partner informed her about Maisnier's status. The letter was prepared contemporaneously with Maisnier's discharge from the program a few days earlier. Nothing would have been served by requiring Camp, the letter's author, to testify. She would have merely confirmed an action taken by the program to discharge Maisnier after he left the program without permission. Her demeanor on the stand would not have constituted a significant factor in evaluating the truthfulness of that statement.

Further, it is of no consequence that Vallejo's testimony about what Geronimo (the Salvation Army intake coordinator) told Ramirez (Vallejo's partner) may have constituted double hearsay. Our decision in *People v. Shepherd* (2007) 151 Cal.App.4th 1193 (*Shepherd*), on which Maisnier relies, is decidedly different. In that case, the prosecution alleged the defendant had violated the terms of his probation by consuming alcohol. (*Id.* at p. 1196.) At the revocation hearing, the defendant's probation officer testified that he had been informed by a treatment program administrator that the defendant had smelled of, and tested positive for, alcohol consumption. The program administrator did not testify, and no other evidence supported the administrator's out-of-court statements that the defendant consumed alcohol in violation of his probation. Further, it was unclear whether the administrator had observed the defendant's alleged probation violation or whether she had simply reported what she had been told by other, unidentified witnesses. (*Id.* at p. 1198.) This court held that the good cause standard described in *Arreola* applied and that the prosecution had failed to

show good cause for not securing the live testimony of the sole percipient witness to the alleged probation violation. (*Id.* at p. 1202.)

In *Shepherd*, the ability to confront and cross-examine the percipient witness could well have played a role in assessing the truthfulness of the statement that the probationer consumed alcohol. As this court observed, it was not even clear whether the hearsay declarant had observed the violation. (*Shepherd, supra*, 151 Cal.App.4th at p. 1202.) Here, by contrast, Vallejo simply relayed the *fact* of Maisnier's discharge for leaving without permission. Whether Maisnier had absconded from the residential program was readily verifiable without live testimony from percipient witnesses. No purpose would have been served by requiring Vallejo's partner or the intake coordinator to appear at the revocation hearing unless there were some legitimate concern about the truthfulness that Maisnier had absconded from the program. Maisnier raised no such argument. And, the record reflects no such concerns.

Accordingly, we conclude the trial court did not err in admitting Vallejo's testimony to establish that Maisnier had violated the terms of his probation requiring successful completion of a residential treatment program. The letter from the Salvation Army bore sufficient indicia of reliability to justify its admission without the need for the prosecution to show good cause for Camp's failure to testify and authenticate the document. Vallejo's testimony regarding the fact of Maisnier's discharge was consistent with the letter and sufficiently reliable without showing good cause for Ramirez's and Geronimo's failure to testify.

Even if the trial court erred, any error would be harmless beyond a reasonable doubt. (*Arreola, supra*, 7 Cal.4th at p. 1161.) A probation revocation order may be upheld upon a finding of a single violation. (*Maki*,

*supra*, 39 Cal.3d at p. 717.) Here, it is undisputed that Maisnier failed to maintain contact with probation. As we explain *post*, Maisnier had adequate notice that his failure to contact probation constituted a separate basis for revoking his probation.

**B. Adequate Notice**

Maisnier argues his constitutional due process rights were violated because he was not given adequate notice that he faced revocation of probation for failing to maintain contact with the probation department.

It is well settled that trial courts are required to provide a criminal defendant with certain minimum due process protections before his or her probation is revoked, including written notice of claimed violations. (*Black v. Romano* (1985) 471 U.S. 606, 611–612; see *People v. DeLeon* (2017) 3 Cal.5th 640, 647–648 [describing same due process requirements for parole revocation proceeding]; *People v. Rodriguez, supra*, 51 Cal.3d at p. 441, citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 488–489.) Nonetheless, while a probationer is entitled to certain procedural safeguards, the due process accorded in a revocation proceeding is flexible and does not require the full panoply of procedural protections of a criminal trial. (*Black*, at pp. 612–613; *DeLeon*, at p. 648; *People v. Vickers* (1972) 8 Cal.3d 451, 457–458; *People v. Felix* (1986) 178 Cal.App.3d 1168, 1172.) A probationer’s due process rights at a revocation hearing include written notice of the claimed violations of probation, disclosure of the evidence against the probationer, an opportunity to present evidence, cross-examination of adverse witnesses, and a written statement by the fact finder identifying the reason for revoking probation and the evidence relied on. (*Vickers*, at pp. 458–459; *Morrissey*, at pp. 488–489.) The precise nature of revocation proceedings need not be identical if they assure equivalent due process safeguards. (*Vickers*, at p. 458.)

Here, the record demonstrates that Maisnier was afforded adequate notice of his conduct that violated the terms and conditions of his probation. The revocation of probation petition alleged that Maisnier violated his probation by failing “to successfully complete residential treatment as directed.” Although failure to maintain contact with probation is not specifically set forth as a separate violation, it was, as the trial court noted, “pretty obvious and part and parcel of” the revocation proceedings.

The revocation petition described that Maisnier entered the Salvation Army program on July 6, 2017, and left without permission on July 14, 2017. It was further alleged that after leaving the program, Maisnier made no effort to inform probation about his status or to advise probation about his whereabouts.

Attached to and referenced in the revocation petition was the Solano County Probation Department Adult Placement Instruction Form that Maisnier signed on July 6, 2017. In signing this form, Maisnier acknowledged that failure to complete the program could result in his being “returned to custody for a violation.” (Italics and boldface omitted.) Maisnier agreed to “immediately” contact probation if he left prior to completion or was terminated from the program. (Italics, boldface, and underscoring omitted.) Maisnier further acknowledged that “[f]ailure to maintain contact with Probation/Placement Officer will result in a Bench Warrant.”

At the revocation hearing, Vallejo testified that following his unauthorized departure from the program on July 14, 2017, she received no telephone calls or emails from Maisnier advising her about his whereabouts. Defense counsel’s failure to object to this line of questioning or otherwise express surprise regarding the evidence of Maisnier’s failure to maintain contact with his probation officer supports a reasonable inference defendant

had actual notice of the basis for the proceeding. (See, e.g., *People v. Buford* (1974) 42 Cal.App.3d 975, 982 [defendant failed to seek continuance or additional time for preparation].)

Maisnier's reliance on *People v. Mosley* (1988) 198 Cal.App.3d 1167 is misplaced. In *Mosley*, the reviewing court found the defendant had been denied due process because "[t]he evidentiary phase of the hearing was completed before either [the defendant] or the court was aware of the charge which ultimately constituted the basis for revocation." (*Id.* at p. 1174.) Thus, the defendant had no opportunity to prepare his defense. (*Ibid.*) Here, by contrast, Maisnier's failure to maintain contact with probation was, to quote the trial court, "part and parcel of" his failure to successfully complete his residential treatment program. Maisnier clearly knew he was required to maintain contact with probation, had prior written notice of the allegation regarding his failure to do so, as well as an ample opportunity to present a defense. In sum, Maisnier had adequate notice that he faced revocation of probation for failing to maintain contact with the probation department.

### **DISPOSITION**

The May 21, 2019 order revoking Maisnier's probation and imposing sentence is affirmed.

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Jackson, J.

WE CONCUR:

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Fujisaki, Acting P. J.

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Petrou, J.

*A157669/People v. Nicholas Frederick Maisnier*